



RULE-MAKING ORDER

R-103P (May 2009)
(Implements RCW 34.05.360)

Agency: Employment Security Department

Permanent Rule Only

Effective date of rule:

Permanent Rules

☒ 31 days after filing.

☐ Other (specify) _____ (If less than 31 days after filing, a specific finding under RCW 34.05.380(3) is required and should be stated below)

Any other findings required by other provisions of law as precondition to adoption or effectiveness of rule?

☐ Yes

☒ No

If Yes, explain:

Purpose:

The proposed amendment implements HB 1338 (Ch. 83, Laws of 2009). The new law broadens the ability of the Commissioner of the Employment Security Department to waive application of the higher tax rate for delinquent employers if the employer acted in good faith and application of the higher tax rate would be inequitable. The rule provides standards for the Commissioner to apply in determining whether to waive the higher tax rate for delinquent employers.

Citation of existing rules affected by this order:

Repealed:

Amended: WAC 192-320-035

Suspended:

Statutory authority for adoption: RCW 50.12.010, 50.12.040, 50.29.010

Other authority :

PERMANENT RULE (Including Expedited Rule Making)

Adopted under notice filed as WSR 09-20-096 on October 7, 2009 (date).

Describe any changes other than editing from proposed to adopted version:

Clarifies that standard of review specified in the WAC applies only to administrative proceedings, not to judicial review.

Clarifies and allows resolution of potential conflicts between paragraphs (3)(b) and (3)(c) by stating that disqualifications from waiver in (3)(b) apply "in the usual course of business."

Allows waiver of the delinquent tax rate following resolution of an appeal by entering into a payment plan as well as by paying in full.

If a preliminary cost-benefit analysis was prepared under RCW 34.05.328, a final cost-benefit analysis is available by contacting:

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Date adopted:

November 16, 2009

NAME (TYPE OR PRINT)

Paul Trause

SIGNATURE

Paul Trause

TITLE

Deputy Commissioner

CODE REVISER USE ONLY

| | |
|------|------------|
| DATE | 09-24-2009 |
| TIME | 9:53 |
| BY | 09-24-2009 |

(COMPLETE REVERSE SIDE)

**Note: If any category is left blank, it will be calculated as zero.
No descriptive text.**

**Count by whole WAC sections only, from the WAC number through the history note.
A section may be counted in more than one category.**

The number of sections adopted in order to comply with:

| | | | | | | |
|---|-----|-------|---------|----------|----------|-------|
| Federal statute: | New | _____ | Amended | _____ | Repealed | _____ |
| Federal rules or standards: | New | _____ | Amended | _____ | Repealed | _____ |
| Recently enacted state statutes: | New | _____ | Amended | <u>1</u> | Repealed | _____ |

The number of sections adopted at the request of a nongovernmental entity:

| | | | | | |
|-----|-------|---------|-------|----------|-------|
| New | _____ | Amended | _____ | Repealed | _____ |
|-----|-------|---------|-------|----------|-------|

The number of sections adopted in the agency's own initiative:

| | | | | | |
|-----|-------|---------|----------|----------|-------|
| New | _____ | Amended | <u>1</u> | Repealed | _____ |
|-----|-------|---------|----------|----------|-------|

The number of sections adopted in order to clarify, streamline, or reform agency procedures:

| | | | | | |
|-----|-------|---------|-------|----------|-------|
| New | _____ | Amended | _____ | Repealed | _____ |
|-----|-------|---------|-------|----------|-------|

The number of sections adopted using:

| | | | | | | |
|---------------------------------------|-----|-------|---------|-------|----------|-------|
| Negotiated rule making: | New | _____ | Amended | _____ | Repealed | _____ |
| Pilot rule making: | New | _____ | Amended | _____ | Repealed | _____ |
| Other alternative rule making: | New | _____ | Amended | _____ | Repealed | _____ |

Amendatory Section (Amending WSR 07-23-127, filed 11/21/07, effective 1/1/08) **IE**

WAC 192-320-035

How are unemployment insurance tax rates determined for employers who are delinquent on taxes or reports?

(1) An employer that has not submitted by September 30 all reports, taxes, interest, and penalties required under Title 50 RCW for the period preceding July 1 of any year is not a "qualified employer."

(2) For purposes of this section, the department will disregard unpaid taxes, interest, and penalties if they constitute less than either one hundred dollars or one-half of one percent of the employer's total tax reported for the twelve-month period immediately preceding July 1. These minimum amounts only apply to taxes, interest, and penalties, not to failure to submit required reports.

(3)(a) This section does not apply ((to services under RCW 50.04.160 performed in domestic service in a private home, local college club, or local chapter of a college fraternity or sorority)) if the otherwise qualified ((domestic)) employer shows to the satisfaction of the commissioner that he or she acted in good faith and that application of the rate for delinquent taxes would be inequitable. This exception is to be narrowly construed to apply at the sole discretion of the commissioner, recognizing that the delinquent tax rate only applies after the employer has already received a grace period of not less than two months beyond the normal due date for reports and taxes due. The commissioner's decision shall be subject to administrative review only under the arbitrary and capricious standard and shall be reversed in administrative proceedings only for manifest injustice based on clear and convincing evidence.

(b) Except for services under RCW 50.04.160 performed in domestic service in a private home, local college club, or local chapter of a college fraternity or sorority, the commissioner will not find in the usual course of business that application of the rate for delinquent taxes would be inequitable:

(i) If the employer has been late with filing or with payment in more than one of the last eight consecutive quarters immediately preceding the applicable period;

(ii) If the delinquency was due to absences of key personnel and the absences were because of business trips, vacations, personnel turnover, or terminations;

(iii) If the delinquency was due to adjusting by more than two quarters the liable date when the employer first had employees; or

(iv) If the employer is a successor, the rate for delinquent taxes is based on the predecessor, and the successor could or should have determined the predecessor's tax status at the time of the transfer.

(c) Examples of when the commissioner may find that application of the rate for delinquent taxes would be inequitable include if the delinquency results from:

(i) An employer reducing its tax payment by the amount specified as a credit on the most recent account statement from the department, when the credit amount is later determined to be inaccurate;

(ii) Taxes due which are determined as the result of a voluntary audit;

(iii) Resolution of a pending appeal and any amounts due are paid within thirty days of the final resolution of the amount due or the department approves a deferred payment contract within thirty days of the final resolution of the amount due;

(iv) The serious illness or death of key personnel or their family that extends throughout the period in which the tax could have been paid prior to September 30 and no reasonable alternative personnel were available and any amounts due are paid no later than December 31 of such year; or

(v) An employee or other contracted person committing fraud, embezzlement, theft, or conversion, the employer could not immediately detect or prevent the wrongful act, the employer had reasonable safeguards or internal controls in place, the employer filed a police report, and any amounts due are paid within thirty days of when the employer could reasonably have discovered the illegal act.

(d) When determining whether an employer acted in good faith and that application of the rate for delinquent taxes would be inequitable, the following factors are considered neutral and neither support nor preclude waiver of the rate for delinquent taxes:

(i) The harshness of the burden on the employer caused by application of the rate for delinquent taxes;

(ii) Lack of knowledge by the employer, bookkeepers, accountants, or other financial advisors about application of the law or the potential harshness of the rate;

(iii) Delay by the employer or its representative in opening mail or receiving other notice from the department; or

(iv) Error by a payroll, bookkeeping, or accounting service on behalf of an employer.

(4) The department shall provide notice to the employer or employer's agent that ~~((he or she))~~ the employer may be subject to the higher rate for delinquent taxes if the employer does not comply with this section. Notice may be in the form of an insert or statement in July, August, or September billing statements or in a letter or notice of assessment. Evidence of the routine practice of the department in mailing notice in billing statements or in a notice of assessment shall be sufficient to establish that the department provided this notice. No notice need be provided to an employer that is not currently registered and active.

(5) An employer that is not a "qualified employer" because of failure to pay contributions when due shall be assigned an array calculation factor rate two-tenths higher than that in rate class 40, unless the department approves a deferred payment contract with the employer by September 30 of the previous rate year. If an employer with an approved deferred payment contract fails to make any one of the payments or fails to submit any tax report and payment in a timely manner, the employer's tax rate shall immediately revert to an array calculation factor rate two-tenths higher than in rate class 40.

(6) An employer that is not a "qualified employer" because of failure to pay contributions when due shall be assigned a social cost factor rate in rate class 40.

(7) Assignment of the rate for delinquent taxes is not considered a penalty which is subject to waiver under WAC 192-310-030.

(8) The amendments to this section effective July 26, 2009, apply only to tax rates assigned after that date.